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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONSOLIDATED RAIL CORPORATION,
Petitioners

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents

BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF CONSOLIDATED RAIL CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Petitioner and *Amicus Curiae*, the National Railway Labor Conference, urges the Court to grant the Consolidated Rail Corporation's ("Conrail") Petition for a Writ of Certiorari. A local labor dispute involving approximately 110 employees of the Maine Central Railroad and the Portland Terminal Company ("MEC/PT") has given rise to a legal issue of profound national importance as well as numerous lawsuits involving most of

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* Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

the large railroads in the United States. At the present time, the Court has pending before it at least two Petitions for a Writ of Certiorari relating to the scope of lawful union economic action during a labor dispute in the railroad industry. *See Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employes*, Docket No. 86-39, July 15, 1986, and *Norfolk and Western Railroad Co. v. Brotherhood of Maintenance of Way Employes*, Docket No. 86-175, August 1, 1986. *Amicus* National Railway Labor Conference has filed an *amicus* brief in support of the *Burlington Northern* Petition and supports the Petition of the Norfolk and Western Railroad. The National Railway Labor Conference is filing the present brief in support of Conrail's Petition because it believes the questions raised by the Petition are intrinsically important and because the factual matrix of the legal issues is somewhat different from those in the *Burlington Northern* and *Norfolk and Western* cases. The Court's consideration and resolution of the legal issues raised by the Petitions would be aided by coordinated consideration of the *Burlington Northern* and *Conrail* cases.

The Conference respectfully submits that the BMWE's escalation of its primary labor dispute with MEC/PT has given rise to numerous lawsuits that, in turn, have created uncertainty about the legal limits of economic self-help in a railway labor dispute. The litigation also implicates the injunctive power of the federal judiciary to vindicate the objectives of the Railway Labor Act and related legislation. The prevailing uncertainty is manifested by a split among the federal courts of appeal, which cannot agree upon the intention of Congress regarding secondary boycotts under the Railway Labor Act. The need for a definitive interpretation of the Railway Labor Act and its relationship to the Norris-LaGuardia Act are issues of first importance to rail carriers, the labor organizations that represent their employees, and

the public that depends on rail transportation. Until the questions presented by this case are answered, the railroad and airline industries will operate in a state of uncertainty that will disrupt ongoing collective bargaining and may imperil labor relations stability.

INTEREST OF AMICUS CURIAE

Virtually all of the nation's Class I railroads are members of the National Railway Labor Conference ("NRLC" or "Conference"). The Conference is the multiemployer representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearinghouse for labor relations information and advises and assists its member railroads about the system established by the Railway Labor Act to adjust disputes arising out of workplace grievances or the interpretation of collective bargaining agreements.

The Conference requests that the Court grant the instant Petition and respectfully submits that its statement in support is desirable because it will more fully apprise the Court of the nationwide impact of the issue before it. The Conference's participation will also more fully inform the Court of the danger posed by Respondent's picketing to the national transportation system and the economy which depends upon it for survival.

BACKGROUND

The Brotherhood of Maintenance of Way Employes ("BMWE") represents approximately 110 active railroad workers employed by Maine Central Railroad ("MEC") and the Portland Terminal Co. ("PT"), small local rail carriers located in Maine. The BMWE contract with MEC/PT reopened in 1984, and the parties began negotiations aimed at a new contract covering

rates of pay, rules and working conditions. By March 3, 1986, the parties had exhausted the major dispute resolution procedures of the Railway Labor Act. The BMWE commenced a lawful strike against the carrier, and later, its corporate affiliates, the Boston & Maine ("B&M") and the Delaware & Hudson ("D&H") railroads. The BMWE was unable to force MEC to capitulate through its use of a primary strike.

In the spring of 1986, the BMWE attempted to ratchet up the pressure on the MEC/PT by pressuring third-party, neutral employers in an admittedly secondary campaign of economic warfare. Conrail was among the early railroads to experience secondary economic action. On April 3, 1986, the Union threatened economic pressure against Conrail stating that the BMWE would ask Conrail employees whom the BMWE represented to "withdraw their services" and further threatened other "economic pressure" against Conrail. The Union's express purpose for threatening such pressure was to "stop all forms of revenue to [Guilford[1]]." The Union insisted that Conrail cease doing business with the D&H, an affiliate of the Maine Central Railroad. Conrail Petition, pp. 4-5.

Faced with a substantial threat, Conrail sought conferences with the BMWE to resolve the dispute. The Union refused, and Conrail thereafter invoked the services of the NMB under Section 5 of the Act. Conrail Petition, p. 5. Conrail also filed a complaint in the United States District Court for the Western District of New York and a motion for a temporary restraining order. The motion was granted on April 6, 1986. The BMWE was enjoined from engaging in economic action against Conrail. The temporary restraining order was converted to a preliminary injunction and appealed to

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[1] Guilford Transportation, Inc. is the parent corporation of MEC, PT, B&M, and D&H.

the United States Court of Appeals for the Second Circuit. On May 15, 1986, the Court of Appeals granted the Union's motion for a stay pending appeal, and within twenty-four hours, the BMWE struck and picketed Conrail at eighty locations across its rail system. Union agents picketed several Conrail facilities and, even where there was no picketing, Conrail employees represented by the BMWE responded to the Union's call to pressure Conrail by engaging in work stoppages in support of the Union's position in the MEC/PT dispute. Conrail Petition at p. 6. On the following day, President Reagan issued Executive Order No. 12,557, 51 Fed. Reg. 18,429 (May 20, 1986) appointing Presidential Emergency Board No. 209 to investigate and report on the BMWE's dispute with the MEC and PT, pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160.

An explanatory statement accompanying Executive Order No. 12,557 made the following observations about the secondary economic action directed against Conrail. Picketing by BMWE employees of the Conrail system

> . . . began on May 15th, 1986. This action, if continued, could result in layoffs of 80,000 workers in key rail-served industries within the first two weeks, and the total of 135,000 workers if the strike continued for a full month, in addition to the 35,000 nonmanagement employees of Conrail. Beyond the loss of revenues to the railroad, the strike would halt production of approximately $85 million worth of goods per day and could mean layoffs of 65,000 in motor vehicles manufacturing, 30,000 in steelmaking and other primary metals production, and 10,000 each in coal mining, chemicals production, and the pulp and paper industries. A strike against Conrail would also halt the Amtrak passenger trains carrying 45,000 travelers each week—approximately one-eighth of total Amtrak intercity passengers.

22 Weekly Comp. Pres. Doc. 643 (1986).

On June 5, 1986, the United States Court of Appeals for the Second Circuit issued a *per curiam* opinion vacating the preliminary injunction ruling that the Norris-LaGuardia Act applied to the Maintenance of Way Employes activities against Conrail and deprived the District Court of jurisdiction to issue a preliminary injunction. The court concluded that the Railway Labor Act's resolution procedures for major and miscellaneous disputes were not applicable to the Union's economic action directed at Conrail.

Emergency Board No. 209 issued its Report on June 21, 1986, and the Railway Labor Act's cooling off period expired thirty days later. On August 21, 1986, President Reagan signed into law House Joint Resolution 683 (Public Law 99-385) which extended the Railway Labor Act's cooling off period to September 18, 1986, and, *inter alia*, appointed a Special Congressional Advisory Board to report on the dispute.

Thereafter, on September 23, 1986, the House adopted Senate Joint Resolution 415 which provided that the report and recommendations of Presidential Emergency Board 209 be binding on the parties and have the same effect as though arrived at by agreement. The Joint effect as though arrived at by agreement. The President signed the legislation on September 30, 1986.[2]

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[2] The passage of legislation resolving the narrow dispute that was the subject of the Emergency Board proceeding does not moot the controversy between Conrail and the BMWE about the lawfulness under the Railway Labor Act of secondary economic action. Collective bargaining in the railroad industry is influenced by the perception of economic force and the prospects for legislative action in the event an agreement cannot be reached. Thus, the dispute between Conrail and the BMWE continues both in the context of their own collective bargaining and as unwilling participants in the disputes of other rail carriers and labor organizations. In all but the most extraordinary case, the particular underlying dispute would be resolved by agreement, capitulation or legislation before the Supreme Court would have an opportunity to determine the

THE DECISION OF THE COURT OF APPEALS WILL DESTABILIZE LABOR RELATIONS IN THE RAILROAD INDUSTRY

The Railway Labor Act and the judicial precedent interpreting its provisions reflect a substantial accommodation of the principle of free collective bargaining to the ultimate goal of labor peace in the economically vital rail-transportation industry. In *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 149 (1969), the Court observed that Congress sought to avoid rail labor strikes by designing a collective bargaining process that was "almost interminable." The tilt of this accommodation is further reflected in the occasions where Congress has had to intervene to restore or preserve vital rail services against a strike that imperils the rail system. *See, e.g.*, 128 Cong. Rec. H.7382 (Sept. 22, 1982) (summary of rail strike legislative intervention); *Brotherhood of Loc. Firemen & Engineers v. Chicago B. & Q. R. Co.*, 225 F. Supp. 11, 21-23 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964).

The Court has inferred a prohibition against self-help when the underlying dispute can be resolved through the grievance procedure. *See Brotherhood of R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957). It has also inferred a prohibition against economic action where the labor organization has not exhausted the statute's collective bargaining procedures or bargained in good faith. *Chicago & N.W. R.R. Co. v. United Transp. Union*, 402 U.S. 570 (1971). These restrictions are not intended to be punitive. Rather, they reflect a strong bias against the disruption that inevitably accompanies the exercise of economic force in a rail labor dispute. The Railway La-

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lawfulness of the secondary economic action. *See Sosna v. Iowa*, 419 U.S. 393 (1975); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). *See generally* Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L.Rev. 373 (1974).

bor Act itself, and the Court when it has been called upon to interpret the statute, has almost invariably opted for stability rather than economic strife, and a policy constraining the use of self-help, even after RLA procedures have been exhausted. *Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, 384 U.S. 238 (1966).

The decision of the Court of Appeals below conflicts with the decisions of this Court and the goals of the Railway Labor Act. The collective bargaining relationship between the carrier, and its employees and their labor representatives exists before, during and after the period of self-help. The maintenance of that relationship is a statutory interest patently more important than the policy authorizing "economic warfare." The Court recognized the need to weigh these interests in *Brotherhood of Ry. Clerks v. Florida E.C. Ry.*, *supra*, and resolved the matter by removing certain economic weapons from the parties' arsenals.

In its decision in the *Conrail* litigation, the Court of Appeals incorrectly relied on *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), as authority permitting secondary action in an RLA dispute. This important issue was not clearly before the Court in *Jacksonville Terminal*, and the Court of Appeals' extrapolation of the Court's opinion in that case is at odds with the Court's traditional exegesis of the Railway Labor Act.

The *Conrail* case should be heard with the *Burlington Northern* petition because *Conrail* presents a factual record that more clearly illustrates the interaction of the secondary action and the labor relations of the secondary employer. The BMWE represents the maintenance-of-way workers on the Conrail property. The history of this dispute reflects that representatives of the Union arranged for picketing at Conrail facilities. Even at sites where there was no picketing, "Conrail employees, who are also represented by BMWE, engaged in their own work stoppage . . . ." Conrail Petition, p. 6. This was

consistent with earlier BMWE threats that the Union "would ask Conrail employees whom BMWE represents to 'withdraw their services.'" Conrail Petition at p. 5.

The Conrail situation illustrates the important point that secondary economic action in the railroad industry takes more forms than "stranger picketing" and "employees' decisions to honor picket lines." The hegemony of certain labor organizations[3] throughout the railroad industry transforms the characteristics of secondary activity from mere "stranger picketing" to include a "labor dispute on the secondary carrier, implicating the RLA dispute resolution procedures of conference and mediation under Sections 2 and 5." The Union rejected conference and mediation. Conrail Petition, p. 8. The decision of the Court of Appeals leaves this secondary labor dispute unregulated and uncontrolled, an outcome at odds with the purposes of the Railway Labor Act and the decisions of this Court. 45 U.S.C. § 151(a). This Court uniformly has approved the use of injunctions to enforce RLA dispute resolution procedures of conference and mediation. *See Chicago & N.W.*, *supra* p. 7; *Detroit & T.S.L.*, *supra* p. 7; *Texas & N.O. R.R. Co. v. Railway Clerks*, 281 U.S. 548 (1930).

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[3] 49th Annual Report, National Mediation Board, pp. 38-39 (1983).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* National Railway Labor Conference urges that the instant petition be *granted.*

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